QUESTION PRESENTED

Whether, in an employment discrimination action brought under Title VII, a Federal court is barred from hearing the merits of the claim de novo by the preclusive effect of a state appellate court's confirmation of a state administrative agency's determination rejecting the claim, where (1) Title VII requires prior recourse to the state agency, (2) the state appellate court is limited to a standard of review that precludes any hearing on the merits, and (3) the state agency determination is made without the procedural protections afforded by a Federal court trial?

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IN THE

Supreme Court of the United States

No. 80-6045

OCTOBER TERM, 1981

RUBIN KREMER, *Petitioner,*

v.

CHEMICAL CONSTRUCTION CORPORATION,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF OF PETITIONER

PRIOR OPINIONS

The opinion of the Court of Appeals for the Second Circuit in this case is reported at 623 F.2d 786 (2d Cir. 1980), and appears at J.A. 69.[1] Two opinions of the United States District Court for the Southern District of New York are reported at 477 F. Supp. 587 (S.D.N.Y. 1979) (Sofaer, J.), and 464 F. Supp. 468 (S.D.N.Y. 1978) (Pierce, J.), and appear respectively at J.A. 55 and J.A. 43.

JURISDICTION

The judgment of the Court of Appeals, entered on June 2, 1980, appears at J.A. 69. Its order of October 15, 1980, denying a timely filed petition for rehearing en

[1] References to the Joint Appendix will be cited as "J.A.".

banc (Judges Oakes and Newman dissenting), appears at J.A. 80. The petition for certiorari was filed on January 13, 1981, and certiorari (limited to the first question presented) was granted on June 22, 1981, together with petitioner's motion for leave to proceed *in forma pauperis*. J.A. 81. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent text of each of the statutes involved in this case appears in the appendix to this brief as indicated:

42 U.S.C. § 2000e-2(a) appears at 1a.
42 U.S.C. § 2000e-5(c) appears at 1a.
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28 U.S.C. § 1738 appears at 2a.
N.Y. Exec. Law § 295(6)(a) appears at 2a.
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N.Y. Exec. Law § 297-a(7)(d) and (e) appears at 2a-3a.
N.Y. Exec. Law § 298 appears at 3a.
N.Y. Civ. Prac. Law § 7803 (3) and (4) appears at 3a.

STATEMENT OF THE CASE

Petitioner Rubin Kremer is a 63-year-old engineer who emigrated from Poland in 1970. He was fired from his job with respondent Chemical Construction Corporation ("Chemico") and refused reemployment, both allegedly because of his Jewish faith and national origin. Petitioner's employment discrimination complaint under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, was dismissed below on res judicata grounds without any consideration of the merits by a Federal Court.

A. *Facts and State Proceedings*

In May 1976, petitioner filed a *pro se*[2] discrimination charge with the Federal Equal Employment Opportunity Commission ("EEOC"), asserting that Chemico had discharged him and subsequently refused to rehire him because of his national origin and religion, in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a) (1974). J.A. 5-8.[3] As required by the "deferral" provisions of Title VII, 42 U.S.C. § 2000e-5(c)(1974), which provide that the EEOC may not consider a claim until a state agency having jurisdiction over employment discrimination complaints has had at least 60 days to resolve the matter, the EEOC referred petitioner's charge to the New York State Division of Human Rights ("NYHRD"). NYHRD is the state agency charged with the enforcement of the New York law prohibiting employment discrimination. N.Y. Exec. Law §§ 295(6), 296(1)(a) (McKinney Supp. 1972-1980).

The investigation conducted by NYHRD was perfunctory at best. A conference at which all parties were to be present was canceled. Instead, Kremer was sum-

[2] Petitioner was without the assistance of counsel until his appeal to the Second Circuit.

[3] Kremer had been hired by Chemico as a piping engineer in 1973. He was the only Jewish employee in his department, J.A. 9, 37, and he alleged that Chemico had signed the "anti-Jewish and anti-Israeli Arab boycott", J.A. 19. Only a month before petitioner's discharge, a supervisor recommended "Hold for knowledge and skills", J.A. 21, 37; other Chemico personnel familiar with his work regarded him as a "technically competent piping analytical engineer" with an "excellent background", J.A. 21. Other employees of the same job description who had been laid off at the same time as petitioner were later rehired, J.A. 8, 19-20, 37, but petitioner was not, despite repeated applications for advertised openings. J.A. 8, 20, 37.

moned by NYHRD to "review" documents submitted by Chemico. J.A. 18-19. During this "review" session, Kremer was admonished, "Read faster, I have to go for lunch".[4] It is unclear what additional investigation, if any, NYHRD undertook (and, indeed, the NYHRD file did not record statements favorable to petitioner, J.A. 19). But it is not disputed that NYHRD never heard any of the witnesses Kremer repeatedly identified. Nor is it disputed that Chemico's written assertions as to the reasons for petitioner's discharge and the refusal to rehire him were never tested in an adversary proceeding. There was no discovery, no formal record was made and petitioner was unrepresented by counsel. Petitioner was not able to call or cross-examine witnesses.

NYHRD thereafter informed petitioner that there was "no probable cause" to believe that Chemico had discriminated in failing to rehire him. J.A. 13-14. As to Kremer's claim that his initial discharge was unlawful, the NYHRD decision was silent.

In pursuit of a hearing at the administrative level, Kremer, still without counsel and following the procedure suggested on the NYHRD form notice, J.A. 14, appealed NYHRD's ruling, first to the New York State Human Rights Appeal Board ("Appeal Board"), and then to the Appellate Division of the State Supreme Court. Under state law, both the Appeal Board and the Appellate Division were limited to determining whether NYHRD's order was "arbitrary and capricious" or "an abuse of discretion."[5] Neither the Appeal Board nor the

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[4] Kremer letter to EEOC, June 15, 1978, at 3.

[5] *See* N.Y. Exec. Law § 297-a(7)(e) (McKinney 1972); N.Y. Exec. Law § 298 (McKinney Supp. 1972-1980); N.Y. Civ. Prac. Law § 7803(3) (McKinney 1981); pp. 22-23, *infra*.

Appellate Division had legal authority to hold a full hearing or to make any independent inquiry into the facts. Indeed, neither had power to do more than remand to NYHRD for reconsideration or further investigation. The Appeal Board affirmed the NYHRD determination, J.A. 15-16, and notified petitioner that any effort to obtain judicial review "shall" be brought in the Appellate Division. J.A. 17.[6] Without oral argument, the Appellate Division "confirmed" the Appeal Board decision. J.A. 25-26.

B. *EEOC Proceedings.*

From the outset, petitioner made manifest his preference for a Federal determination of his claims. He lodged his initial complaint with the EEOC. J.A. 3. He went to NYHRD only on instructions from the EEOC. He returned to the EEOC when NYHRD was slow in reaching a decision. J.A. 45. Indeed, he renewed his EEOC complaint two days *before* filing his appeal to the Appellate Division. J.A. 18-22, 23-24.

The EEOC, however, did not conduct an investigation. Rather, it examined NYHRD's "findings" and "the record presented" and stated that there was "not reasonable cause to believe the charge is true". J.A. 27-28. The EEOC also issued a "Notice of Right to Sue", J.A. 29-31, and informed Kremer that he had the right to "pursue this matter further, if so desired, by filing a private action in Federal District Court." J.A. 27-28.[7]

[6] Consistent with the lower Federal courts' unanimous view of the law as it then existed, *see* cases cited at p. 17, *infra*, this notice did not inform petitioner that such an appeal would waive his right to bring a Title VII action in Federal court. Nor did it explain the narrowly limited standard of review that the Appellate Division would apply.

[7] The EEOC notices thus embodied the EEOC's position that a Federal Title VII action is not barred by a state appellate court review of a state agency determination.

C. Proceedings Below.

Following the instructions in the EEOC's right to sue notice, petitioner brought this Title VII action *pro se* in the district court. J.A. 36-38. Before filing its answer, respondent moved for dismissal of the complaint or for summary judgment on the ground of res judicata. J.A. 39. Relying upon the decision in *Mitchell* v. *National Broadcasting Co.*, 553 F.2d 265 (2d Cir. 1977), Chemico claimed that petitioner's appeal of the NYHRD decision to the Appellate Division precluded a Federal court action under Title VII. *Mitchell* had held that an employment discrimination action brought under 42 U.S.C. § 1981 is barred by the res judicata effect of an Appellate Division appeal of an NYHRD determination.

The District Court initially denied Chemico's motion, refusing to extend the reasoning of *Mitchell* to Title VII cases. *Kremer* v. *Chemical Construction Corp.*, 464 F. Supp. 468 (S.D.N.Y. 1978) (Pierce, J.), J.A. 43-52. Some months later, however, in an unrelated *pro se* case, the Second Circuit held that the rule of preclusion announced in *Mitchell* applied to Title VII actions. *Sinicropi* v. *Nassau County*, 601 F.2d 60 (2d Cir.) (per curiam), *cert. denied*, 444 U.S. 983 (1979). The District Court thereupon reconsidered Chemico's motion to dismiss. Concluding that "*Sinicropi* permits no choice" but to grant the motion, Judge Sofaer nevertheless observed that "[t]o submit to . . . *Sinicropi* . . . is not to agree with [it]", and urged its overruling for numerous reasons. *Kremer* v. *Chemical Construction Corp.*, 477 F. Supp. 587, 591 (S.D.N.Y. 1979) (Sofaer, J.), J.A. 55, 59-60.

Represented by counsel on appeal to the Second Circuit, petitioner sought to overturn *Sinicropi*. Alternatively, he argued that *Sinicropi* should be given prospective effect only. The Court of Appeals panel refused both re-

quests. *Kremer* v. *Chemical Construction Corp.*, 623 F.2d 786 (2d Cir. 1980), J.A. 69-78. Joined by the EEOC as *amicus curiae*, petitioner sought rehearing en banc, again urging that *Sinicropi* be overruled. Rehearing en banc was denied, Judges Oakes and Newman dissenting. J.A. 80.

As a result of these decisions, Rubin Kremer has never had a hearing on his discrimination claim. His only administrative "hearing" was a foreshortened opportunity to state his claim orally to a NYHRD field investigator. His only judicial "hearing" was an appellate review of the administrative "determination" under a legal standard that precluded a de novo judicial inquiry.

SUMMARY OF ARGUMENT

Quite apart from the issues raised by Title VII, the court below misapplied traditional doctrines of res judicata and collateral estoppel.[8] But this is a Title VII case. And the decision below is at odds with Title VII and its unique statutory scheme that Congress designed to eradicate employment discrimination — a policy "of the highest priority". *New York Gaslight Club, Inc.* v. *Carey*, 447 U.S. 54, 63 (1980), *quoting Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412, 416 (1978).

[8] For convenience, we will refer in this brief to the claimed preclusive effect of state proceedings upon petitioner's Federal claim as "res judicata". Technically speaking, the traditional concept of res judicata should not apply, since the state proceedings did not, and could not have, considered petitioner's Federal Title VII cause of action. *See* Brief for the United States as Amicus Curiae in Support of the Petition for Certiorari at 4, n.2. The Court of Appeals has referred to the issue as one of "res judicata", however, and whether that term is used, or whether the issue is described as involving "collateral estoppel" or, under 28 U.S.C. § 1738, "full faith and credit" for state court judgments, the same arguments against preclusion of the Federal claim apply.

This Court has repeatedly held that under Title VII a plaintiff has the right to a de novo Federal court hearing of his or her claim. Congress in Title VII provided for limited mandatory recourse to state anti-discrimination procedures as part — but only part — of a comprehensive system of overlapping and supplementary remedies to eliminate employment discrimination. If relief is not obtained under state procedures, Title VII specifically gives plaintiffs the right to seek relief in Federal administrative and, ultimately, judicial forums.

Because Congress has mandated a Federal court forum as a supplement to state remedies, no state proceedings — and certainly not the cursory proceedings which took place in this case — can preclude a subsequent Federal court action. Neither the doctrine of res judicata nor the provisions of 28 U.S.C. § 1738 require otherwise. Res judicata is not applied where doing so would contravene other substantive Federal policies, such as those embodied in Title VII. Similarly, the statutory full faith and credit requirements of section 1738 are overridden by the more specific commands of Title VII. In any event, the issue before the state court — whether administrative rejection of petitioner's claim was arbitrary or capricious — is not the same issue as the Federal court must hear de novo — whether there was in fact discrimination.

Moreover, the limited proceedings in NYHRD followed by a cursory review in state court are in no way a substitute for a de novo hearing before a Federal judge with full rights of discovery, cross-examination and appeal on the complete record so developed. Finally, the doctrine of res judicata is subject to an exemption where there has not been a "full and fair hearing" of the claim in the first forum. In this case, the state proceedings afforded no real "hearing" whatever.

The decision below not only deprives plaintiffs of rights mandated by Title VII, but it will also discourage state court review of state agency proceedings. In order to avoid preclusion of Federal claims, plaintiffs are likely to withdraw from state proceedings at the earliest possible time. State courts will therefore exercise less supervision over state administrative actions and more cases are likely to be brought in Federal court. Thus, the decision below will effectively undermine the very state anti-discrimination procedures that Congress sought to encourage in Title VII.

ARGUMENT

I. Dismissal Of Petitioner's Claim Is Inconsistent With Title VII Law And Policy As Well As Traditional Notions Of Res Judicata

A. *Title VII and Decisions of this Court Give Petitioner the Right to a De Novo Federal Court Hearing on the Merits of His Claim.*

When Congress enacted Title VII, it created "a comprehensive enforcement scheme" for the resolution of employment complaints. *New York Gaslight Club, Inc.* v. *Carey, supra*, 447 U.S. at 63. Under this carefully crafted legal structure, a complainant may not seek relief in the Federal courts unless he or she has (1) submitted the claim under any applicable state or local law to the appropriate state or local agency having jurisdiction over employment discrimination complaints, 42 U.S.C. § 2000e-5(c); and then (2) submitted the claim to the EEOC, 42 U.S.C. § 2000e-5(f)(1). It is only after the state agency and the EEOC have had the opportunity to resolve the case that "a civil action may be brought" in the district court. 42 U.S.C. § 2000e-5(f)(1). *See New York Gaslight Club, Inc.* v. *Carey, supra*, 447 U.S. at 64-65.

It is settled beyond argument that the "civil action" in district court under Title VII must be "a trial de novo". *Chandler* v. *Roudebush*, 425 U.S. 840, 844-45 (1976). *See also Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47-48 (1974); *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 798-99 (1973). Because Congress "considered the policy against discrimination to be of the 'highest priority'", *Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 47, it vested the Federal courts with "final responsibility", *id.* at 44, and "plenary powers", *id.* at 47; *Chandler* v. *Roudebush, supra*, 425 U.S. at 845, for enforcement of Title VII. Under Title VII, a plaintiff has a "statutory right to attempt to establish his claim in a Federal court," *Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 56, "if satisfactory relief is not obtained in state *forums*," *New York Gaslight Club, Inc.* v. *Carey, supra*, 447 U.S. at 67 (emphasis supplied).

In the face of such unequivocal expression of Congressional intent, the Second Circuit nevertheless ruled that limited state court review of a state agency determination made without a hearing brought under a state statute converts an agency decision lacking preclusive effect into a court adjudication that bars a Federal court from considering the merits of a Title VII claim. This ruling not only ignores the statutory obligations of Federal courts under Title VII, but misapplies traditional notions of res judicata as well.

B. *The Right to a De Novo Federal Court Hearing Is Not Lost Under Principles of Res Judicata As a Result of Petitioner's State Court Appeal.*

Important values of course underlie the principle of res judicata, including repose, judicial economy and promotion of comity between state and Federal courts. *See Allen* v. *McCurry*, ____ U.S. ____, 101 S. Ct. 411, 415 (1980);

Brown v. *Felsen*, 442 U.S. 127, 131 (1979). While we show below at pp. 25-28, 32-33, that these values are in fact undermined, not promoted, by the decision of the Court of Appeals, the fact is that courts have also long recognized that the doctrine does not require pursuit of these values at all costs. Rather, res judicata is to be applied only after a "careful inquiry", *Brown* v. *Felsen, supra*, 442 U.S. at 132, and a weighing of "competing necessities", *Spilker* v. *Hankin*, 188 F.2d 35, 38 (D.C. Cir. 1951).

Just last Term, this Court indicated that the traditional doctrine of res judicata does not bar a Federal claim "when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Allen* v. *McCurry, supra*, 101 S. Ct. at 415. Res judicata attaches only to those issues that actually were or could have been raised in the state court action. *Federated Department Stores, Inc.* v. *Moitie*, ___ U.S. ___, 69 L. Ed.2d. 103, 108 (1981). In this case, of course, petitioner had no opportunity at all to raise the issue of Chemico's discriminatory conduct in state court. The sole issue that the Appellate Division is empowered to review is whether the NYHRD determination was arbitrary and capricious or an abuse of discretion. *See* pp. 22-23 *infra*. It could not consider the issue that the district court must hear under Title VII — whether, in fact, Kremer had suffered discriminatory treatment.*

* If petitioner were seeking Federal court review of the single issue that was actually litigated in state court — whether the NYHRD determination under state law was arbitrary or capricious — his suit might be barred. But that question is not at issue in this Federal Title VII action. *See also* p. 18 n. * *infra*.

In any event, the traditional doctrine of res judicata does not require preclusion of a Federal claim, where, as here, doing so would "submerge the plan of Congress for the administration and enforcement" of a substantive Federal policy, *Denver Building and Construction Trades Council* v. *NLRB*, 186 F.2d 326, 332 (D.C. Cir. 1950), *rev'd on other grounds*, 341 U.S. 675 (1951), or "contravene an overriding public policy", *Tipler* v. *E. I. duPont deNemours & Co.*, 443 F.2d 125, 128 (6th Cir. 1971). *See Brown* v. *Felsen*, *supra*, 442 U.S. at 132; 1B *Moore's Federal Practice* ¶ 0.405 at 783-91 (1980).

In enacting the de novo hearing requirement of Title VII, Congress expressed just this sort of overriding public policy. Recognizing that fact, this Court has found that Title VII permits relitigation of claims that might otherwise be barred by prior determinations. Thus, in *Alexander* v. *Gardner-Denver Co.*, *supra*, 415 U.S. 36, 52-54, this Court held that an employee's submission of a discrimination claim to final arbitration under a labor contract did not preclude a Title VII action based on the same facts. The strong Federal policy favoring the finality of arbitral decisions was outweighed by the de novo hearing policy of Title VII. 415 U.S. at 59-60. Just as Title VII grants "a statutory right independent of the arbitration process," *id.* at 54, thereby giving the employee the right to successive hearings of his or her claim, it also grants a right to sue in Federal court that is "independent", *id.* at 48, of any state-created rights. In *Chandler* v. *Roudebush*, *supra*, this Court held that a Civil Service Commission adjudication, which was supported by the clear weight of the evidence and which found that a Federal agency had not acted discriminatorily, nevertheless did not bar a Federal court action under Title VII based on the same facts. *Cf. Barrentine* v. *Arkansas-Best Freight System, Inc.*, ___ U.S. ___, 101 S. Ct. 1437 (1981) (arbitration of

employees' wage and hour dispute does not preclude Federal court action under Fair Labor Standards Act based on same claim).

Similarly, despite the usual applicability of res judicata to the decisions of administrative agencies acting in a judicial capacity, *see, e.g., United States* v. *Utah Construction & Mining Co.*, 384 U.S. 394, 421-22 (1966), the lower Federal courts have uniformly concluded that the application of res judicata to state and local agency determinations would contravene Title VII's de novo trial requirement.[10]

And significantly, with the lone exception of the court below and district courts bound by it, every Federal court, including the Courts of Appeals for the Third and Eighth Circuits, has agreed, for one or more of the reasons discussed here, that a limited state appellate court review of state agency determinations does not bar a subsequent Federal Title VII action.[11]

[10] *See, e.g., Smouse* v. *General Electric Co.*, 626 F.2d 333, 335 (3d Cir. 1980); *Gunther* v. *Iowa State Men's Reformatory*, 612 F.2d 1079, 1084-85 (8th Cir.), *cert. denied*, 446 U.S. 966 (1980); *Batiste* v. *Furnco Construction Corp.*, 503 F.2d 447, 450 (7th Cir. 1974), *cert. denied*, 420 U.S. 928 (1975); *Cooper* v. *Philip Morris, Inc.*, 464 F.2d 9, 11 (6th Cir. 1972); *Voutsis* v. *Union Carbide Corp.*, 452 F.2d 889, 894 (2d Cir. 1971), *cert. denied*, 406 U.S. 918 (1972).

[11] *See Smouse* v. *General Electric Co., supra; Gunther* v. *Iowa State Men's Reformatory, supra; Kralowec* v. *Prince George's County, Md.*, 503 F. Supp. 985 (D. Md. 1980); *Gavin* v. *Peoples Natural Gas Co.*, 464 F. Supp. 622 (W.D. Pa. 1979), *vacated and remanded on other grounds*, 613 F.2d 482 (3d Cir. 1980); *Kremer* v. *Chemical Construction Corp.*, 464 F. Supp. 468 (S.D.N.Y. 1978) (Pierce, J., decided before *Sinicropi*); *Nickel* v. *Highway Industries, Inc.*, 441 F. Supp. 477 (W.D. Wis. 1977); *Gilinsky* v. *Columbia University*, 440 F. Supp. 1120 (S.D.N.Y. 1977); *Al-Hamdani* v. *State University of New York*, 438 F. Supp. 299 (W.D.N.Y. 1977); *Benneci* v. *Department of Labor*, 388 F. Supp. 1080 (S.D.N.Y. 1975); *Young* v. *South Side Packing Co.*, 369 F. Supp. 59 (E.D. Wis. 1973).

In striking out on its own in *Sinicropi* v. *Nassau County*, *supra*, the Second Circuit extended to Title VII cases the reasoning of its earlier decision in *Mitchell* v. *National Broadcasting Co.*, *supra*. As noted above, *Mitchell* held that a state court appeal of an NYHRD determination bars a subsequent action under 42 U.S.C § 1981 in Federal court. While the *Mitchell* court recognized that a proceeding before a state agency did not bar a Federal court action, 553 F.2d at 276, it held that res judicata for section 1981 purposes did attach when a complainant "crosses the line" between state administrative and state judicial proceedings. *Id.*[12] The *Sinicropi* decision then mistakenly assumed, without discussion and without benefit of any argument on the issue, that section 1981 and Title VII are interchangeable for res judicata purposes.[13] They are not.

The statutory scheme of Title VII is altogether "unique" *Gunther* v. *Iowa State Men's Reformatory*, *su-*

[12] However, the *Mitchell* panel premised this holding on its finding that

> "There is little doubt that the issue raised by the § 1981 claim [whether there was in fact discrimination] is identical to the question first presented to the [NYHRD]." 553 F.2d at 270.

But under Title VII, the fact that the "issue" that must be heard in Federal court is the same as the issue initially presented to NYHRD cannot be determinative. Title VII requires resort to the state agency; thus, the issue presented to the state agency is necessarily identical to the one before the Federal court. But, of course, state agency determinations under Title VII never have res judicata effect.

[13] Nor did *Sinicropi* discuss the scholarly criticism of extending *Mitchell* to Title VII actions. See, e.g., Comment, *State Appellate Court Judgment on Employment Discrimination in Res Judicata in Subsequent Federal Action Under Section 1981*, 62 Minn. L. Rev. 987 (1978); Note, *'Twas a Nibble and Not a Bite: Res Judicata and Section 1981*, 53 N.Y.U. L. Rev. 187 (1978).

pra, 612 F.2d at 1084, n.6, having no parallel in those Civil Rights statutes, 42 U.S.C. §§ 1981-1987, which date from the Reconstruction Era. Unlike Title VII, none of the Reconstruction Era statutes contemplates, much less requires, prior recourse to state and Federal administrative remedies. *See, e.g., Goss* v. *Revlon, Inc.*, 548 F.2d 405, 407 (2d Cir. 1976), *cert. denied*, 434 U.S. 968 (1977). They do not establish comprehensive enforcement schemes and timetables into which state anti-discrimination procedures are incorporated. And, unlike Title VII, they have never been held to grant the right to a de novo Federal court hearing.

Congress' concern with the "unique" structure of Title VII remedies was particularly evident in the 1972 amendments to Title VII. As this Court recognized in its extensive analysis of those amendments in *Chandler* v. *Roudebush, supra*, 425 U.S. at 843-61, Congress rejected proposals to create a Federal administrative agency to hear and determine employment discrimination cases, subject to limited judicial review of the administrative record. Faced with a clear choice between "record review of agency action based on traditional appellate standards and trial *de novo* of Title VII claims," Congress chose the latter. *Id.* at 861. Congress thus made clear its intent that the factfinding in Title VII cases ultimately should be done not by administrative agencies, whether Federal or state, but by the courts. It is inconceivable that, as respondent now argues, the same Congress which expressly rejected Federal court "record review" of EEOC determinations impliedly intended to make state appellate court "record review" of state agency determinations a bar to Title VII actions in Federal court.

C. *The Limited Appellate Division Review of the NYHRD Determination Does Not Fulfill The Hearing Requirement of Title VII.*

The structure and legislative history of Title VII leave no doubt that Congress intended that Title VII actions be "trial[s] de novo and not, in any sense, suit[s] for judicial review of [EEOC] determination[s]". Interpretive Memorandum of Senators Clark and Case, 110 Cong. Rec. 7213 (1964). *See also Chandler* v. *Roudebush, supra,* 425 U.S. at 844-45. If a district court may not apply a substantial evidence test to the administrative record, but rather must make "a fresh determination of the facts and issues", *Weahkee* v. *Perry,* 587 F.2d 1256, 1263 (D.C. Cir. 1978), then surely a state proceeding in which the courts do anything less fails to satisfy the Congressional requirement for de novo judicial consideration. The combination of state agency proceedings and Appellate Division review under an "arbitrary and capricious" standard fails to meet the de novo hearing requirements of Title VII.

In *Alexander* v. *Gardner-Denver Co., supra,* this Court found "arbitral processes [to be] comparatively inferior to judicial processes in the protection of Title VII rights." 415 U.S. at 57. Chief among the reasons was that "the factfinding process in arbitration usually is not equivalent to judicial factfinding":

> "The record of the arbitration proceedings is not as complete; the usual rules of evidence do not apply; and rights and procedures common to civil trials, such as discovery, compulsory process, cross-examination, and testimony under oath, are often severely limited or unavailable. . . . [I]t is the informality of arbitral procedure that enables it to function as an efficient, inexpensive, and expeditious means for dispute resolution. This same characteristic, however, makes arbitration a less appropriate forum for final resolution of Title VII issues than the Federal courts." *Id.* at 57-58.

The factfinding process in state and local anti-discrimination agencies is often subject to these same procedural infirmities.[14] Because their chief purpose is to "settle disputes through conference, conciliation, and persuasion", *cf. Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 44, agency factfinding procedures are relatively informal. In the present case, which is by no means exceptional, *see, e.g., Sinicropi* v. *Nassau County, supra,* 601 F.2d at 62, NYHRD did not even conduct an evidentiary hearing. Rather, its decision to dismiss petitioner's charge was based on an informal *ex parte* interview and written submissions. NYHRD never heard any of the witnesses petitioner identified. It did not require Chemico to submit to cross-examination under oath. It afforded petitioner only a hurried "review" of Chemico's submissions. It made no formal record. Such procedures may be well-suited to the settlement of disputes through conference, conciliation, and persuasion. But they are not adequate for final resolution of the merits of Title VII claims.

The built-in limitations of NYHRD's procedures were not cured by the very limited judicial review in the Appellate Division. Under New York law, review of determinations by the NYHRD and the Human Rights Appeal Board may be obtained only pursuant to Executive Law

[14] *See, e.g., Smouse* v. *General Electric Co., supra,* 626 F.2d at 335; Comment, 62 Minn. L. Rev., *supra;* Report of the New York State Bar Association Joint Task Force on the Practices and Procedures of the New York State Division of Human Rights and the New York State Human Rights Appeal Board (April 1981) (Documenting inadequate "written standards and guidelines for [NYHRD] investigations" and "poorly conducted investigations, inadequate retention of notes, and the absence of sufficient information to enable the Appeal Board to conduct an adequate review of no-probable-cause findings", *id.* at 16-17).

§ 298 or Civil Practice Law Art. 78. Under either provision, when a complaint is dismissed for lack of probable cause, review is strictly limited to consideration of whether the administrative action was arbitrary and capricious or an abuse of discretion. *See Mize* v. *State Division of Human Rights*, 33 N.Y.2d 53, 57, 304 N.E.2d 231, 233, 349 N.Y.S.2d 364, 367-368 (1973).[15]

Such limited appellate review has no alchemistic powers. It cannot transform a perfunctory, informal administrative investigation, such as was conducted in this case, into the equivalent of the judicial trial de novo mandated by Congress. Thus, for res judicata purposes, the "crucial inquiry" is "how the [state antidiscrimination agency] proceeds". *Smouse* v. *General Electric Co.*, *supra*, 626 F.2d at 336. The line drawn by the Second Circuit in *Sinicropi* between state administrative and state judicial proceedings, 601 F.2d at 62, is, then, altogether arbitrary. All of the reasons which dictate that state agency determinations not be given preclusive effect carry over with undiminished force to state court appeals of such determinations made under a limited standard of review.

One result of the line drawn by the Court of Appeals between administrative remedies (which do not bar Federal claims) and limited judicial review (which does), is to make a distinction among Title VII plaintiffs that is wholly irrational. Thus, under the Second Circuit's rule, a complainant who is accorded thorough administrative proceedings, including an evidentiary hearing, an admin-

[15] If the NYHRD determination is made on the record after a public hearing, it is reviewed under a substantial evidence standard, rather than an arbitrary and capricious test. *Mayo* v. *Hopeman Lumber & Mfg. Co.*, 33 A.D.2d 310, 313, 307 N.Y.S.2d 691, 694 (4th Dep't), *appeal dismissed*, 26 N.Y.2d 962, 259 N.E.2d 477, 311 N.Y.S.2d 5 (1970).

istrative appeal on a complete factual record, or even an award of relief, but who stops short of seeking review in the state courts, is free to pursue non-duplicative Federal remedies under Title VII. As this Court held in *New York Gaslight Club, Inc.* v. *Carey, supra*, a complainant who is awarded backpay and reinstatement after a full NYHRD hearing can still pursue an action in Federal court to obtain attorneys' fees. In contrast, a complainant, like petitioner, whose complaint is summarily dismissed by the state agency without an evidentiary hearing, whose administrative appeal is conducted without benefit of a genuine factual record, and who is awarded no relief whatever, is barred from Federal court — simply because he or she asked a state court to order the agency to grant the evidentary hearing that the hypothetical first complainant has already had. Such a result cannot possibly be squared with the structure and intent of Title VII.

D. *The Decision Below Is Also Inconsistent With Congress' Intent To Encourage Full Use Of State Antidiscrimination Remedies.*

In enacting Title VII, Congress established a "comprehensive enforcement scheme," *New York Gaslight Club, Inc.* v. *Carey, supra*, 447 U.S. at 63, in which state and Federal administrative agencies, as well as Federal courts, are assigned specific roles. On the one hand, Congress desired that employment discrimination disputes be resolved at the state or local level whenever possible. *See* 110 Cong. Rec. 12725 (1964) (remarks of Sen. Humphrey); *Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 44. It therefore created the structure for the referral and deferral procedures, *see* 42 U.S.C. § 2000e-5(c), whereby state and local agencies are given a "limited opportunity to resolve problems of employment discrimination," *Oscar Mayer & Co.* v. *Evans*, 441 U.S. 750, 755

(1979), before the aggrieved party may complain to the EEOC, or if unsatisfied there, to a Federal court. Prior resort to the appropriate state agencies is mandatory under Title VII. *Love* v. *Pullman Co.*, 404 U.S. 522, 523 (1972). On the other hand, Congress understood full well that state and local antidiscrimination laws "very widely in effectiveness [and that in] many areas effective enforcement is hampered by inadequate legislation, inadequate procedures, or an inadequate budget". 110 Cong. Rec. 7205 (1964) (remarks of Sen. Joseph Clark, cosponsor of the 1964 Act). It therefore afforded complainants the right to a Federal forum when the state fails to provide "prompt or complete relief". *New York Gaslight Club, Inc.* v. *Carey, supra*, 447 U.S. at 65.

The comprehensive framework established by Title VII is one in which state and Federal remedies are "complementary". *Voutsis* v. *Union Carbide Corp., supra*, 452 F.2d at 894. Title VII remedies are intended to "supplement rather than supplant" state and local remedies. *Alexander* v. *Gardner-Denver Co., supra*, 415 U.S. at 48. "Congress envisioned that Title VII's procedures and remedies would 'mes[h] nicely, logically, and coherently with the State and city legislation,' and that remedying employment discrimination would be an area in which '[t]he Federal Government and the State governments could cooperate effectively'." *New York Gaslight Club, Inc.* v. *Carey, supra*, 447 U.S. at 63-64, (quoting remarks of Sen. Clark at 110 Cong. Rec. 7205 (1964)).

Henceforth, however, if the *Sinicropi* rule is allowed to stand, well-informed Title VII plaintiffs will not appeal NYHRD determinations to the Appellate Division. Rather, they will bypass the state courts entirely and go directly to Federal court. Neither Congress' intent "to encourage full use of state remedies", *New York Gaslight*

Club, Inc. v. *Carey, supra,* 447 U.S. at 66, n. 6, nor the policy of comity, is well-served by a res judicata rule which encourages wholesale abandonment of the state judicial process.[16]

The inevitable long-term effect of *Sinicropi* will be to undermine the effectiveness of state and local anti-discrimination agencies. For an administrative system from which appeals are rarely, if ever, taken is destined to deteriorate in quality. Without continuous judicial supervision, uniform standards will not be maintained, agency excesses will not be checked, and procedures will not be improved. As a result, even more complainants will desert the state administrative system at the earliest point permitted by the deferral provisions. *Sinicropi,* then, will lead to the gradual displacement of state remedies by Federal remedies — "a strange version of comity", as Judge Sofaer put it below. *Kremer* v. *Chemical Construction Corp., supra,* 477 F. Supp. at 592, J.A. 63. By undermining the vitality and effectiveness of state and local agencies, *Sinicropi* contravenes the "policy of cooperation", *New York Gaslight Club, Inc.* v. *Carey, supra,* 447 U.S. at 64, between the Federal and state systems which is a keystone of Title VII's grand design.[17]

[16] Where, as here, the state appellate court can grant no relief other than a remand to the state agency for further investigation or proceedings, the appeal is properly viewed as *part* of the administrative process. The *Sinicropi* rule disrupts that process by deterring plaintiffs from seeking court assistance in getting it to work.

[17] The *Sinicropi* rule is inconsistent with Congressional intent in several additional respects. First, it contravenes Congress' intent "to accord parallel or overlapping remedies against discrimination", *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 47, and "to allow an individual to pursue independently his rights under both Title VII and other applicable state and federal statutes", *id.* at 48. This provision of multiple avenues of relief reflects Congress' view

II. Petitioner's Federal Court Action Is Not Barred By 28 U.S.C. § 1738 Or By Considerations Of Comity.

A. *Section 1738 is Subject to the Same Limitations as the General Doctrine of Res Judicata and Does Not Bar a Federal Action Where There Was Not A "Full and Fair Opportunity" To Litigate the Claim in State Court.*

The *Sinicropi* decision relied implicitly on 28 U.S.C. § 1738 in finding that a state court appeal bars a Federal action based on the same operative facts. *See Mitchell* v. *National Broadcasting Co., supra,* 553 F.2d at 271-77. In the context of Title VII, the Second Circuit was wrong — and, indeed, it was wrong under section 1738 without regard to Title VII considerations.

To be sure, section 1738 ordinarily requires Federal courts to give preclusive effect to state court judgments

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that the elimination of employment discrimination is of "the highest priority". *New York Gaslight Club, Inc.* v. *Carey, supra.* The duplication of judicial effort and increased burden on defendants which may result are costs that Congress knowingly decided to incur. It is not for the courts to overturn that decision, See *Chandler* v. *Roudebush, supra,* 425 U.S. at 864.

Second, the *Sinicropi* rule undercuts Congress' reliance on private litigation to secure broad compliance with Title VII. The Title VII litigant is a private attorney general, vindicating an important public policy. *New York Gaslight Club, Inc.* v. *Carey, supra,* 447 U.S. at 63, *Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 45. By placing an unnecessary stumbling block in the way of the unwary private litigant, the *Sinicropi* rule may sometimes shield a discriminatory employer from the reach of civil litigation. *Cf. Voutsis* v. *Union Carbide Corp., supra,* 452 F.2d at 892.

Third, the *Sinicropi* rule is at odds with Title VII's remedial purpose. Plaintiffs under Title VII "should not be held accountable for a procedural prescience that would have made a Baron Parke happy or a Joseph Chitty proud." *Voutsis* v. *Union Carbide Corp., supra,* 452 F.2d at 892.

whenever the court of the rendering state would do so. Section 1738, however, like the doctrine of res judicata discussed above at pp. 13-20, is subject to exceptions. Where "other well defined federal policies, statutory or constitutional", outweigh the policies underlying § 1738, a Federal court will not follow the state rule of repose. *American Mannex Corp.* v. *Rozands*, 462 F.2d 688, 690 (5th Cir.), *cert. denied*, 409 U.S. 1040 (1972). *Accord, Batiste* v. *Furnco Construction Corp., supra*, 503 F.2d at 450. Since, as shown above, Congress specifically intended in Title VII to provide for de novo Federal court determination of the merits of employment discrimination claims and to encourage full use of state remedies, the "well-defined . . . policies" of Title VII supersede the general provisions of section 1738. *See* Currie, *Res Judicata: The Neglected Defense*, 45 U. Chi. L. Rev. 317, 333 (1978) (Congress can grant the "extraordinary option of relitigating issues pertinent to state court litigation"). Unlike the situation in *Allen* v. *McCurry, supra*, where Congressional intent to override section 1738 and common law preclusion rules was "equivocal", 101 S. Ct. at 417, intent here is clear and already recognized in this Court's earlier decisions. Preclusion would undermine a Congressional plan to enforce a national policy of the "highest priority".[18]

[18] In *Occidental Life Insurance Co.* v. *EEOC*, 432 U.S. 355 (1977), this Court held that state statute of limitation periods will not be borrowed by Federal courts in Title VII actions where their application would frustrate the implementation of the policies underlying Title VII. The reasoning of *Occidental Life* is equally compelling here. Just as the states, in establishing general limitations periods, could not have taken into account the specific decision of Congress to delay judicial action on Title VII claims until the EEOC and state agencies had performed their statutorily mandated responsibilities, *id.* at 368, so too the states, in fashioning general res judicata rules, could not have taken into account the specific decision of Congress to afford

B. ***In Any Event, This Title VII Action Is Not A Collateral Attack On A State Court Judgment But Rather an Assertion Of An Independent Federal Statutory Right.***

Chemico has claimed that petitioner is seeking "license" for the Federal courts "to review the judgments of state courts". Brief in Opposition to Petition for Certiorari at 21. Petitioner is seeking nothing of the kind. As noted above at pp. 14-15, petitioner is only seeking de novo Federal court determination of an issue that the Appellate Division did not and could not have decided — whether Chemico in fact discriminated against him. *See Benneci* v. *Department of Labor, supra,* 388 F. Supp. at 1082. *Cf. Alexander* v. *Gardner-Denver Co., supra,* 415 U.S. at 54 (in instituting a Title VII action, "the employee is not seeking review of the arbitrator's decision. Rather, he is asserting a statutory right independent of the arbitration process".)

Concerns about comity are entirely misplaced in this sort of case. In *Allen* v. *McCurry, supra,* this Court held that a plaintiff under section 1983 may not relitigate search and seizure questions in Federal court that were fully and fairly litigated in a state criminal proceeding. To allow such relitigation, absent a clear Congressional directive, would be a direct affront to the state court. It would imply that state court judges are less capable of finding facts or less zealous in their defense of Federal rights. In contrast, de novo consideration in this case

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Title VII plaintiffs de novo Federal court consideration when state antidiscrimination procedures fail to afford complete relief. In each case, "it is the duty of the federal courts to assure that the importation of state law will not frustrate or interfere with the implementation of national policies". *Id.* at 367. Yet just such "frustration" would occur if state res judicata law is "imported" through section 1738 without regard to the structure and intent of Title VII.

would carry no such implication, because no facts whatever were found by the state court.[19] As the district court noted, "comity has generally been understood to require deference to state decisions based on the same scope of review applied in comparable federal proceedings." *Kremer* v. *Chemical Construction Corp., supra,* 477 F. Supp. at 592, J.A. 63.

III. The Decision Below Is Unwise As A Matter Of Judicial Administration.

If the decision below stands, no well-informed litigant will appeal NYHRD determinations to the Appellate Division. This will have two unwelcome consequences. The first, as discussed above at pp. 26-27, will be a deterioration of the state administrative process. The second will be an increase in the Federal court caseload. Employment discrimination disputes which might otherwise have been resolved by state agencies after a state court remand will now come directly to the Federal courts. Their numbers may well exceed the number of Federal cases that can be dismissed on res judicata grounds, since plaintiffs will soon learn not to blunder across the line from state agencies to state courts.[20] *Sinicropi* may perhaps win a short-lived respite for the overburdened Federal courts. But in the long run, it is penny-wise and pound-foolish. Once plaintiffs get wise, the result will be more, not less, Title VII litigation in the Federal courts. In *Alexander* v. *Gardner-Denver, supra,* this Court specifi-

[19] The fact that the Federal court is not bound by the cursory conclusions of NYHRD is no more an affront to the state agency or court than the de novo trial requirement is an affront to the EEOC's fact-finding ability.

[20] If the decision below stands, the EEOC and state agencies will surely start to inform complainants that an Appellate Division appeal will foreclose a Title VII action in Federal Court.

cally addressed an analogous issue. It rejected preclusion by arbitral proceedings in part because it would induce employees to "bypass arbitration and institute a lawsuit", resulting in "more litigation, not less". *Id.* at 59. The *Sinicropi* rule will have the same effect.

Moreover, whatever conservation of Federal court resources is achieved by *Sinicropi* will be at the expense of the unwary and the uninformed. *Pro se* plaintiffs like petitioner are especially likely to fall into *Sinicropi's* trap. This is a particularly troubling prospect, given the broad remedial and protective purposes of Title VII. To be sure, judicial economy comes only at a price. But if a Title VII plaintiff must settle for a cursory state administrative procedure and a sharply restricted state court review instead of the Federal hearing on the merits to which he or she has a statutory right, then the price is too high.

CONCLUSION

For the reasons discussed above, the judgment of the Court of Appeals should be reversed and the case remanded for trial.

Respectfully submitted,

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APPENDIX

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Pertinent Parts of Statutes Involved

TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

42 U.S.C. § 2000e-2. *Unlawful Employment Practices*

"(a) It shall be an unlawful employment practice for an employer—

> "(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . ."

42 U.S.C. § 2000e-5. *Enforcement Provisions*

> ". . . .
>
> "(c) In the case of an alleged unlawful employment practice occurring in a State, or political subdivision of a State, which has a State or local law prohibiting the unlawful employment practice alleged and establishing or authorizing a State or local authority to grant or seek relief from such practice or to institute criminal proceedings with respect thereto upon receiving notice thereof, no charge may be filed under subsection (b) of this section [with the EEOC] by the person aggrieved before the expiration of sixty days after proceedings have been commenced under the State or local law, unless such proceedings have been earlier terminated . . .
>
> ". . . .
>
> "(f)(1) . . . If a charge filed with the Commission pursuant to subsection (b) of this section is dismissed by the Commission . . . the Commission . . . shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge . . . by the person claiming to be aggrieved. . . ."

FULL FAITH AND CREDIT

28 U.S.C. § 1738. *State and Territorial Statutes and Judicial Proceedings: Full Faith and Credit*

"The records and judicial proceedings of any court of any . . . State, Territory or Possession . . . shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory or Possession from which they are taken."

NEW YORK STATE HUMAN RIGHTS LAW

N.Y. EXEC. LAW § 295. *General Powers and Duties of Division*

"The [Human Rights] division, by and through the commissioner or his duly authorized officer or employee, shall have the following functions, powers and duties:

". . . .

"6. (a) To receive, investigate and pass upon complaints alleging violations of this article. . . ."

N.Y. EXEC. LAW § 296. *Unlawful Discriminatory Practices*

"1. It shall be an unlawful discriminatory practice: (a) For an employer . . . because of the age, race, creed, color, national origin, sex, or disability, or marital status of any individual, to refuse to hire or employ or to bar or to discharge from employment such individual . . ."

N.Y. EXEC. LAW § 297-a. *State Human Rights Appeal Board*

". . . .

"7. The [Human Rights Appeal] board may affirm, remand or reverse any order of the [Human Rights] division or remand the matter to the division for further proceedings in whole, or with respect to any part thereof, or with respect to any party, provided however that the board shall limit its review to whether the order of the division is:

". . . .

"d. supported by substantial evidence on the whole record; or

"e. not arbitrary, capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion."

N.Y. EXEC. LAW § 298. *Judicial Review and Enforcement*

"Any complainant . . . aggrieved by any order of the [Human Rights Appeal] board may obtain judicial review thereof . . . in a proceeding as provided in this section. Such proceeding shall be brought in the appellate division of the supreme court. . . ."

NEW YORK CIVIL PRACTICE LAW

N.Y.C.P.L.R. § 7803. *Questions Raised*

"The only questions that may be raised in a proceeding under this article are:

". . . .

"3. whether a determination was made in violation of lawful procedure, was affected by an error of law or was arbitrary and capricious or an abuse of discretion, including abuse of discretion as to the measure or mode of penalty or discipline imposed; or

"4. whether a determination made as a result of a hearing held, and at which evidence was taken, pursuant to direction by law is, on the entire record, supported by substantial evidence."